Appeal No. 2006AP662 **Cir. Ct. No. 2004CV341**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

BEAVER DAM AREA DEVELOPMENT CORPORATION, ERIC BECKER, JEFF KITCHEN, AL SCHWAB, LES FRINAK, JR., JOHN LANDDECK, DOUG MATHISON, TOM OLSON, GREG STEIL, RON THOMPSON, STEVEN BALDWIN, NANCY ZIEMAN, GINA STASKAL, BRIAN BUSLER, AND JACK HANKES,

DEFENDANTS-RESPONDENTS,

MYRTLE CLIFTON, LAINE MEYER, DUANE FOULKES, AND PHILIP FRITSCHE,

DEFENDANTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2005-06),[1] we certify this appeal to the Wisconsin Supreme Court, which will determine whether the Beaver Dam Area Development Corporation ("the Corporation") is subject to Wisconsin's

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

open meetings and public records laws. The core issues in this case concern the establishment of a cogent and workable legal test to determine whether a corporation is a "quasi-governmental corporation," as that term is used in the open meetings and public records laws, and the application of that standard to the facts of this case.

BACKGROUND

The State of Wisconsin seeks a judgment declaring that the defendant Corporation is subject to the open meetings and public records laws and an order requiring the Corporation to conduct its affairs in compliance with those laws. The circuit court held that the Corporation is not subject to the open meetings and public records laws because it does not meet the definition of a "quasi-governmental corporation" within the meaning of these statutes.

The Corporation was formed in 1997 as a private, nonstock, nonprofit corporation under Wisconsin law. Its stated purpose, as set forth in its by-laws, is to engage in economic development and business retention within the corporate limits and lands which could become part of the limits of the City of Beaver Dam. The City of Beaver Dam has signed a cooperation agreement with the Corporation. Under that agreement, the City provides funding and other forms of assistance to the Corporation in consideration for the Corporation's undertaking and assisting economic development within the City. There are a number of other facts about the Corporation and its relationship with the City that would likely be used in making the ultimate decision in this case, but they are not necessary to discuss the central legal issue presented by this case.

DISCUSSION

The open meetings law provides that meetings of a "governmental body" must be preceded by public notice and held in open session. WIS. STAT. § 19.83. The term "governmental body" is defined to include several specific types of governmental bodies, and also "a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation …." WIS. STAT. § 19.82(1).[2]

The public records law provides that "[e]xcept as otherwise provided by law, any requester has a right to inspect any record." WIS. STAT. § 19.35(1). A "record" is defined to include certain kinds of material created or kept by "an authority." WIS. STAT. § 19.32(2). The term "authority" is defined to include several specific types of governmental officials and bodies, and also "a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation …." WIS. STAT. § 19.32(1). Therefore, the issue of whether a corporation is "quasi-governmental" is presented by both laws. Neither statute defines "quasi-governmental."

The parties agree that no published Wisconsin case law creates or applies a definition of "quasi-governmental" in the open meetings or public records context. However, the question has been addressed in several opinions of the attorney general, most recently in 1991. 80 Wis. Op. Att'y Gen. 129, 134 (1991). The parties disagree as to whether the circuit court in this case actually

[2] It is not clear as to why the legislature excepted the Bradley Center Sports and Entertainment Corporation from the requirements of the open meetings law and the open records law.

applied that most recent attorney general opinion. The State discusses whether the earlier opinions of the attorney general are consistent with each other, but we do not focus on the details of *each* of those opinions. Rather, because the parties' arguments discuss the 1991 opinion, and they at least superficially appear to agree that it is the proper test to apply, we regard that opinion as a good place to begin our discussion.

In the 1991 opinion, the attorney general noted that the legislature has declared that the provisions of the open meetings law must be liberally construed to ensure that the public has the "fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." 80 Wis. Op. Att'y Gen. 129, 134 (1991); WIS. STAT. §§ 19.81(1) and (4). He concluded that, for purposes of the open meetings law, "quasi-governmental corporations" is not limited to nonstock body politic corporations created directly by the legislature or some other governmental body, but also includes corporations that were not created directly by a governmental body, but have some other attributes that resemble a governmental corporation. 80 Wis. Op. Att'y Gen. at 134-35. He specifically concluded that "quasi-governmental corporations" include private corporations which "closely resemble a governmental corporation in function, effect or status." ***Id.*** at 135. The attorney general further stated that whether a particular private corporation resembles a governmental corporation closely enough to be a "quasi-governmental corporation" must be determined on a case-by-case basis, "in light of all the relevant circumstances." ***Id.*** at 136. The opinion then reviewed the facts relating to the two corporations at issue.

The 1991 opinion did not, however, attempt to develop a general list of factors that are significant in determining the status of corporations. In

reviewing the specific facts, the opinion considered whether: (1) the corporation serves a public purpose; (2) most of the corporation's funding is from public sources; (3) government officials serve on the corporation's board by virtue of their offices; (4) government officials select the officers of the corporation; (5) government or government employees are involved in the day-to-day operations of the corporation; (6) the corporation's offices are located in government buildings; and (7) whether government and the corporation have a relationship relating to supplies, equipment, and payroll and benefits. ***Id.*** at 136.

The problem with the 1991 opinion is that it does not address the legislative intent behind the inclusion of "quasi-governmental" corporations in the scope of the open meetings and public records laws.[3] It is well-established law that statutory interpretation is a device to ascertain and apply legislative intent, but the opinion does not include any analysis of legislative intent on that point. The opinion notes that the drafting file for the bill that created the then-current version of the open meetings law "contains no information on the intended meaning of 'governmental or quasi-governmental corporation.'" 80 Wis. Op. Att'y Gen. at 132. However, the absence of a specific documentary history of the intent does not mean that legislative intent can be disregarded or was non-existent; it simply means that the intent must be ascertained through other methods of analysis. Therefore, we believe that any set of factors used to determine whether a

[3] Under WIS. STAT. § 19.81(1), Wisconsin's open meetings law, it is the declared "policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Similarly, the declared policy of Wisconsin's public records law is "that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." WIS. STAT. § 19.31.

corporation is "quasi-governmental" should flow from a developed discussion of legislative intent.

We have not been provided with factual information about the extent to which governments around the state have contracted with corporations to perform public functions or to be involved in public issues. However, the prior opinions of the attorney general give us some sense of the types of organizations about which the question has been asked. They include volunteer fire departments, 66 Wis. Op. Att'y Gen. 113 (1977); a nonprofit corporation organized to run the Circus World Museum, 73 Wis. Op. Att'y. Gen. 54 (1984); "friends" organizations that support state-owned public television stations, 74 Wis. Op. Att'y Gen. 38 (1985); and the economic development organizations discussed in 80 Wis. Op. Att'y Gen. 129 (1991). It is clear that a decision in this case will affect the use of corporations to perform public functions.

The import of a judicial decision is this: the more narrow the definition of "quasi-governmental corporation," the greater the ability of governments to delegate public functions to entities that are shielded from public scrutiny. The State argues that if the interpretation argued for by the Corporation in this case prevails, "governmental bodies throughout this state will be able to deny access to important public information by transferring responsibilities via contract to a private entity." On the other hand, genuinely private corporations presumably should be allowed to conduct their affairs, including some degree of interaction with government bodies or public issues, without themselves becoming entirely subject to the open meetings and public records laws. In addition, we note the potential application of this test to other private entities that contract with state and local governments to provide social services, such as alcohol and drug abuse counseling. Establishing a test to draw the appropriate line consistent with the

legislature's expressed intent is an issue of statewide importance, and the supreme court is the most appropriate court to address the issue.

In addition to creating a test for determining whether a private corporation is a "quasi-governmental corporation," this case will involve the application of that test to the facts related to this specific corporation and its relationship with the City. Those facts present the opportunity to discuss the meaning and weight of several features of the history of this relationship that the parties focus on. For example, the State emphasizes that two city officials serve on the Corporation's board by virtue of their positions as city officials; that the Corporation originally had only one employee, who had previously worked for the City as the economic development director; and that the Corporation was originally housed in the City's municipal building. The Corporation, on the other hand, emphasizes its independent creation and freedom from city control, and the role of private individuals in the Corporation.

This case presents a significant issue of statutory interpretation affecting the public's right of access to information regarding the conduct of government business. We conclude that this appeal is appropriate for resolution by the supreme court.